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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-710

CITIZENS OF INDIANAPOLIS FOR QUALITY SCHOOLS, INC., AND LAURA WALLACE, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND BOARD OF SCHOOL COMMISSIONERS FOR THE SCHOOL CITY OF INDIANAPOLIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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UNITED STATES OF AMERICA AND BOARD OF SCHOOL COMMISSIONERS FOR THE SCHOOL CITY OF INDIANAPOLIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioners, Citizens of Indianapolis for Quality Schools, Inc., and Laura Wallace, et al., pray that a Writ of Certiorari issue to review the opinions and judgment of the United States Court of Appeals For the Seventh Circuit rendered in these proceedings on August 14, 1972. See Appendix A, pp. A1-A7.

OPINIONS BELOW.

The opinion of the Court of Appeals as yet unreported appears at Appendix A, pp. A. 1-A. 7. The order of the District Court appears at Appendix C, pp. A. 14-A. 16.

JURISDICTION.

The order of the United States Court of Appeals for the 7th Judicial Circuit was entered on August 14, 1972. See Appendix A, p. A. 1.

The petition for Certiorari was filed less than 90 days from the aforesaid date. The jurisdiction of the Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

The trial court held that appellants, parents and students should be denied intervention in a pending school desegregation suit because, stating that while appellants had a practical interest in this cause, appellants had "no legal interest over and above that of the board and further there was no showing that this interest was not being adequately represented by the board." The court of appeals conceded appellants' interest in the cause but denied intervention to appellants because "There has been no allegations that the school board's interests are adverse to appellants' or that it has at any time acted in bad faith." The following questions are thereby presented:

1. In the student portion of a school desegregation case commenced by the United States under Title IV of the Civil Rights Act of 1964 charging the defendant school board with operating an unconstitutional system in the racial assignment of faculty and teachers, do parents and students have an interest in such cause which differs from the inter-

est of the school board so as to justify their intervention in said cause as a party defendant to protect that interest?

2. In the student portion of a school desegregation case commenced by the United States under Title IV of the Civil Rights Act of 1964 charging the defendant school board with operating an unconstitutional system in the racial assignment of faculty and teachers, where intervening parents and students have an interest in the subject matter, which interest will be materially affected by an adverse decision in the cause, is it necessary that this interest of parents and students be different from the interest of the existing defendant, the school board to justify intervention to protect that interest?

3. In the student portion of a school desegregation case commenced by the United States under Title IV of the Civil Rights Act of 1964 charging the defendant school board with operating an unconstitutional system in the racial assignment of faculty and teachers, where the unlawful faculty assignment portion of the cause has been separately, previously tried and in which faculty portion of the cause the existing defendant board entered into stipulations and a consent decree agreeing and finding that the defendant board operated an unconstitutional school system in the racial assignment of teachers, have intervening parents and children a right to intervene in the pending student portion of the cause to protect their interest in the subject matter of action?

4. Are bad faith of the existing party or an adversity of interest between existing defendant school board and intervening parents and children necessary prerequisites to intervention by parents and children in a school desegregation action charging defendant board with the unconstitutional operation of its school system, when the intervening parents and students have a conceded vital interest in the subject matter of the action and that interest will be materially affected by an adverse decision?

5. Where intervening parents and children have a substantial interest in the subject matter of a school desegregation suit charging the defendant school board with operating an unconstitutional school system by the racial assignment of students and the interest could be materially affected by an adverse decision, and where intervening parents and children assert interests having common question of law and fact with the main action and no undue delay or prejudice to the adjudication of the rights of the original parties is found by the court, did the court abuse its discretion in not permitting the intervention of the parents and children?

REGULATIONS INVOLVED.

This case involves Rule 24(a) and (b) of the Federal Rules of Civil Procedure 28 U. S. C.:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or

agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C., Sec. 2403.

STATEMENT OF CASE.

This action was commenced in 1968 by a complaint filed by the United States of America under Title IV of the 1964 Civil Rights charging the defendant, Board of School Commissioners for the School City of Indianapolis, with discrimination in the assignment of faculty and students in the Indianapolis Schools. To this complaint the defendant School Board filed its answer denying discriminatory assignments of teachers and students. The portion of the cause relating to faculty assignment was separately tried and the parties in that portion entered into an agreement agreeing that the Indianapolis School System was discriminatory in faculty assignments. On the basis of this agreement of parties the District Court in August, 1968, then entered a consent decree agreed to by the school board finding the Indianapolis Public School System to be in violation of the United States Constitution by discriminatory assignment of faculty. That consent decree set forth remedial measures also agreed upon by the parties.

The portion of the original cause relating to student assignments at this time remained untried. While the student portion of the case was pending, on February 10, 1970, Citizens of Indianapolis for Quality Schools, Inc., representing some five thousand (5,000) parents of students filed its petition to intervene in the student portion of the original suit on behalf of the five thousand (5,000) parents and on behalf of all other parents of students in the Indianapolis Schools and on February 14, 1970, twenty-two (22) students in the Indianapolis Schools on their own behalf and on behalf of all other students in the Indianapolis Schools filed their petition to be additional intervenors. In May, 1971, the Court denied both the petition of the parent group and the petition of the twenty-two (22) students to intervene. Thereafter, on July 12, 1971, the student portion of this cause was tried by the District Court. On August 18, 1971, the District Court entered its judgment, finding the Indianapolis Schools to be discriminatory and unconstitutional and setting forth suggested remedies and ordered the plaintiff to join additional school systems in the townships and counties surrounding Indianapolis as parties defendant and also ordered the defendant to join appropriate governmental agencies as parties defendant. Thereafter, by appropriate motions and court orders twelve (12) additional school systems serving townships and counties surrounding Indianapolis were named as parties defendant; the City of Indianapolis and the Housing Authority of the City of Indianapolis were also named additional defendants. Later on September 14, 1971, a petition to intervene as parties plaintiff was filed by two (2) negro children on their own behalf and on behalf of all other negro students in the Indianapolis school system and intervention by these parties on behalf of all negro school students in the Indianapolis school system was permitted. In September, 1971, the defendant Board of School Com-

missioners filed its Report of Compliance with the August 18, 1971, Order of the District Court which report was accepted and approved by the District Court on September 14, 1971. The cause now pends in the District Court for further proceedings pursuant to the August 18, 1971, order of the District Court.

ARGUMENT.

Both appellants seeking to represent parents and children in the then pending student portion of the case herein sought intervention as a matter of right or as a matter of permission under Rule 24(a) and (b) of the Federal Rules of Civil Procedure of United States Code.[1]

Under Rule 24(a) intervention must be granted as a matter of right when a petitioner seeking intervention: (1) has an interest relating to the transaction which is the subject of the law suit; (2) which interest may as a practical matter be impaired or impeded by deposition of the action; and, (3) when such interest is not adequately represented by the existing parties.

Both the trial court and the circuit court of appeal conceded that appellants have an interest relating to the subject matter of the law suit and the appeals court further conceded that appellants' interest might as a practical matter be impaired by disposition of this litigation.[2] These questions are therefore not herein argued.

However the trial court found that appellants had "no legal interest over and above that of defendant board and further that there was no showing that this interest was not being adequately represented by the defendants" and the appeals courts agreed with the trial court's conclusion "that this conceded interest was adequately represented by

1. Rule 24(a) and (b) of the Federal Rules of Civil Procedure, 28 U. S. C.

2. Appendix A, page 3.

the school board . . ." and stated in its opinion, "There have been no allegations that the school board's interests are adverse to appellants' or that it has at any time acted in bad faith". The court apparently wrongly assumed it to be the burden of the intervenor to show bad faith or an adverse interest.[3]

The question then is: Is this conceded interest of appellants in the subject matter of this cause adequately represented merely because that interest appears to coincide with the interest of the existing defendant school board as found by the trial court and merely because there is no showing of bad faith on the part of the board and no showing that the interest of one was adverse to the other as held by the court of appeals?

SIMILARITY OF INTERESTS.

On first consideration it would appear that the interests of both the appellants and the defendant school board are identical—an interest in a sound educational system operated in accordance with the law[4] and an interest in keeping the board which operates that school system free from judicial restraint so that the board can exercise its discretion to the fullest degree[5] constitutionally permissible in deciding educational questions.

Were this true, if the interest of the existing defendant and these appellants were similar and did in fact coincide, that fact alone would not be sufficient to guarantee with certainty that appellants' interest would be adequately represented and protected so as to preclude these appellants from the opportunity to appear and defend this cause

3. Contra, *Nuesse* v. *Camp*, 128 U. S. App. D. C. 172.

4. *Moore* v. *Tangipahoa Parish School Board*, 298 F. Supp. 288 (1969).

5. *Hobson* v. *Hansen*, 269 F. Supp. 401.

in their own behalf.[6] The mere fact that the existing defendant already represents the position asserted by these appellants does not destroy the right of these appellants to intervene and be heard on their own behalf.[7]

In the case of *Ford Motor Co.* v. *Bisanz Bros., Inc.*,[8] that court, despite its finding that there was no reason to believe that intervenor's interest would not be adequately presented or defended and despite the fact that the interest of the intervenor and the existing party appeared identical, found that there was no certainty that such interest would as a matter of fact be adequately represented and ordered intervention because the practical necessities granted to appellants that right to intervene.

In this case where the existing defendant, by entering into in the teacher portion of this cause, stipulations and a consent decree adverse to appellants' interest,[9] has shown a disposition not to contest the government's allegations, alleging the defendant board to be operating an unconstitutional school system by reason of the racial assignment of faculty and student, can there be any certainty that that same defendant would now in the pending student portion of the cause adequately represent and protect appellants' interest.

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6. *Nuesse* v. *Camp*, 128 U. S. App. D. C. 172; *Textile Workers Union* v. *The Allendale Co., et al.*, 96 App. D. C. 401, 226 F. 2d 766; *Ford Motor Co.* v. *Bisanz Bros., Inc.*, 249 F. 2d 22; Shapiro, "Some Thoughts on Intervention Before Courts, Agencies and Arbitrators", 81 Harv. L. Rev. 721.

Both the *Ford Motor Co.* v. *Bisanz Bros., Inc., supra*, and *Textile Workers Union* v. *The Allendale Co., et al., supra*, were decided under the rule before amendment; however *Nuesse* v. *Camp, supra*, states: "While the change in wording (between the old and new rule) does not relate to any change in standard as such . . ."

7. *Textile Workers Union* v. *The Allendale Co., et al.*, 96 App. D. C. 401.

8. *Ford Motor Co.* v. *Bisanz Bros. Co., Inc.*, 249 F. 2d 22.

9. Appendix B.

Because the defendant board has already agreed upon and consented to a restrictive order in the teacher portion of the case, there is every reason to believe that this same defendant board might once again, in the student portion of this cause, find a restrictive court order to be a "not wholly unwelcome haven" from the buffeting of conflicting demands.[10]

However, contrary to the apparent finding of the district court, even though it may appear that the interest of the existing defendant and the interest of the appellants are identical, there exists real differences between these interests. These differences are clearly set forth by the court in the case of *Nuesse* v. *Camp*:[11]

> "In this case the interest of the parents who wish to intervene in order to appeal do not coincide with those of the Board of Education. The school board represents all parents within the district. The intervening appellants may have more parochial interests centering upon the interest of their own children. Moreover considerations of publicity, costs and delay may not have the same weight for parents as for the board. And the Board of Education, buffeted as it is, like other school boards, by conflicting demands, possibly has less interest in preserving its own untrammeled discretion than do the parents."

The situation presented here is one in which the existing defendant's interest is similar to, but differs in some respect from, the interest of the appellants and appellants want not so much to advance a different claim or interest but to supplement the position of the existing defendant whose stake in the proceedings differ from theirs though there may be no conflict between them. In such a situation the question to be answered before intervention is permitted is not "Is the interest of appellants adequately repre-

10. *Smuck* v. *Hobson*, 408 F. 2d 175 at 181.

11. *Nuesse* v. *Camp*, 128 U. S. App. D. C. 172.

sented!" but rather, "What is the extent of appellants' interest and do considerations of justice and fair play dictate that appellant be heard on a matter of importance to them!"[12]

Appellants strongly argue that the matter of their education and the education of their children is of importance to them and in a law suit where such education may be seriously affected, fair play and justice demand that they be heard.

NEED FOR A SHOWING OF BAD FAITH.

Some courts have held that representation is adequate where there is no showing of bad faith on the part of the existing representative or adversity between the interests of the intervenor and the existing party.[13] However such a holding does not give proper weight to other important considerations,[14] and other courts and authorities after a consideration of other matters have found no need for a showing of bad faith or that the interest of intervenor and the existing party are adverse.[15]

These courts hold that intervention should be liberally granted and should not be made to depend upon such

12. Shapiro, "Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators", 81 Harv. L. Rev. 721 (1968).

13. *Peterson* v. *United States*, 41 F. R. D. 131; *Martin* v. *Kalvar Corp.*, 411 F. 2d 552 (1969).

14. Material affect of adverse decision on interest of intervention—*Textile Workers Union* v. *The Allendale Co., et al.*, 96 App. D. C. 401; 226 F. 2d 766, Practical necessities of the situation—*Ford Motor Co.* v. *Bisanz Bros. Co.*, 249 F. 2d 22; Extent of interest and consideration of fair play, Shapiro, "Some Thoughts on Intervention Before Courts Agencies and Arbitrators", 81 Harv. L. Rev. 721 (1968).

15. "Bad faith is not always a prerequisite to intervention", *Hobson* v. *Hansen*, 44 F. R. D. 18; *Smuck* v. *Hobson*, 408 F. 2d 175 (1969); "Nor is it necessary that interests of intervenor and his putative champion already a party be wholly adverse," *Smuck* v. *Hobson, supra; Nuesse* v. *Camp*, 128 U. S. App. D. C. 172.

absolutes[16] which by their strict application can deny an intervenor vitally interested in a matter the right to be heard on that matter merely because the position he asserts is already asserted by another. Insistence upon a showing of bad faith or adversity of interests may place one who may be materially affected by an adverse decision at the mercy of the judgment of another who, although acting in good faith, does not because of the exercise of his independent judgment choose to present evidence or advance law which could well aid intervenor's interest.

There need not be bad faith or failure of duty by the existing party to adversely affect the interest of another whose interest may actually coincide or appear to coincide with the interest of the existing party. Courts which hold that a showing of bad faith or an adverse interest is necessary also hold that merely because intervenor would have presented the case differently—would exercise different judgment—does not make the other representation inadequate. This may well be true, but does not this very argument show that there is room for differing good faith opinions in the presentment of a cause and argue that bad faith and adverse position should not be a prerequisite for intervention. If intervenor has a vital interest in the case that would be materially affected by an adverse decision, should not he be permitted to make his own presentment or defense? Should not he be permitted to exercise his own judgment to protect a matter of great importance to him and to present his cause in the way his judgment deems best?

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16. "While the change in wording (between old and new rule) does not relate to any change in standard as such it underscores both the burden of those opposing intervention to show the adequacy of the existing representation *and the need for a liberal application in favor* of permitting intervention." *Nuesse* v. *Camp*, 128 U. S. App. D. C. 172, 385 F. 2d 694 cited supra notes 6, 10.

Here appellants have a vital interest in their education and the education of their children. They have a vital interest in seeing that the board which they elected to control that education remains free from judicial restraint to use their discretion to make that education the best possible in their judgment. That vital interest could be and was materially affected by the adverse decision. Should appellants not have had the right to use their own judgment to defend their important interest as they see fit?

PERMISSIVE INTERVENTION.

Rule 24(b)[17] sets forth that intervention as a matter of the court's discretion should be granted if appellants' asserted interests involve legal and factual issues in common with the main action and if intervention would not unduly delay or prejudice adjudication of the rights of the original parties.

There is no question but that appellants' asserted interest involves legal and factual issues in common with the main action—does the defendant school board operate an unconstitutional school system because of racial assignment of faculty and student? This was conceded by the court of appeals. This being so, the only bar to appellants' intervention under the rule would be if undue prejudice or delay would result from such intervention.

Neither the trial court nor the court of appeals found that intervention by the appellants would prejudice adjudication of the rights of the parties or unduly delay such adjudication. Both the trial court and the appeals court were surprisingly silent on this. Here over 18 months

17. "The interest test is primarily a practical guide to disposing of law suits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Smuck* v. *Hobson*, 408 F. 2d 175 (1969) cited supra, notes 9 and 14.

transpired from the time of appellants' application to intervene to the actual trial of the cause. In that period of time appellants could have well prepared for trial—over one year went past from the filing of appellants' application for intervention, filed in February, 1970, until such motion was denied in May of 1971. When the trial court took fifteen months to rule on appellants' motion to intervene, could it then be said that appellants' intervention would cause undue delay? Under such facts it was an abuse of the trial court's discretion not to grant intervention to appellants.

As there are these common legal and factual issues and because there was no finding or even a suggestion that appellants' intervention would prejudice or delay the adjudication of the rights of the original parties, permissive intervention should have been allowed and the trial court abused its discretion in not granting intervention to appellants. This is particularly so because the trial court waited 15 months before ruling on appellants' motion. Having waited so long to rule, the trial court cannot be heard to say that intervention would unduly delay the trial of this cause.

In this cause appellants' interest is a strong and vital interest—the education of the sons and daughters of the parents and the education of the students.

This strong vital interest of appellants could be and was materially affected by a decision adverse to their interests. No undue delay or prejudice to the adjudication of the rights of the original parties was alleged or found by either court. Considerations of justice and fair play strongly suggest that appellants be heard on matters which can materially affect their education and the education of their children. The failure to permit such intervention and to permit these appellants the opportunity to be heard on a matter of such importance to them was an abuse of the trial court's judicial discretion.

Since appellants' motion for permissive intervention meets all requirements of Rule 24(b) intervention should have been permitted and to refuse such intervention was an abuse of discretion. This is particularly true where appellants' representative has already shown an inclination not to contest the action—not to protect appellants' rights and the trial court waited 15 months before denying appellants' motion.

In conclusion, appellants would pose this question: In a law suit whose very instigation presupposes the unfair treatment of some students by the defendant school board, can it rightfully be held that that same defendant school board in the conduct of this cause of action would fairly and adequately represent all the students? Is not the unfair treatment of some students the very basis of this cause?

CONCLUSION.

Reason for Granting Certiorari.

Confusion abounds presently in federal courts in permitting and denying intervention. Since the Cascade Natural Gas case[18] was decided under the new rule no consistent policy on intervention has evolved. Many courts adhere to a strict literal interpretation of Rule 24(a) and (4) and limit intervention to those who meet every term and every apparent requirement of the rules.[19] Other courts have followed a more liberal policy and have permitted intervention when courts following the more strict policy would have denied intervention.[20] This confusion is not limited to intervention in school integration cases but en-

18. *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Company*, 386 U. S. 129; 87 S. C. 932 (1967).

19. See cases set forth in note 6 hereof.

20. See cases set forth in note 13 hereof.

velopes the entire field of civil litigation.[21] The Congress of the United States may have somewhat helped end this confusion as it surrounds school desegregation cases[22] but if so, such confusion still exists as the rule on intervention is applied to all other cases. This court should grant certiorari here so as to consider the rule on intervention and set forth a policy for allowing or denying intervention which could be consistently followed by all federal courts and put an end to this confusion.

Respectfully submitted,

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21. Shapiro, "Some Thoughts on Intervention Before Courts, Agencies and Arbitrators", 81 Harv. L. Rev. 721 (1968).

22. Public Law 92-318, Title 8, see 804.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 71-1461 September Term 1971—April Session 1972

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellees,

CITIZENS OF INDIANAPOLIS FOR QUALITY SCHOOLS, INC., et al.,
Petitioners for Intervention-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 68-C-225

S. HUGH DILLIN; *Judge.*

Argued April 17, 1972—Decided August 14, 1972

Before SWYGERT, *Chief Judge,* MURRAH,* *Senior Circuit Judge,* and JUERGENS,** *District Judge.*

MURRAH, *Senior Circuit Judge.*

This is an appeal from an order of the District Court denying appellants' petition for intervention in a school

* Senior Circuit Judge Alfred P. Murrah of the Tenth Circuit is sitting by designation.

** Chief District Judge William G. Juergens of the Eastern District of Illinois is sitting by designation.

desegregation case as a matter of right or permission under Rule 24(a) and (b) of the Federal Rules of Civil Procedure, 28 U. S. C. The United States initiated this action in 1968, pursuant to Title IV of the 1964 Civil Rights Act (42 U. S. C. § 2000c-6(a) and (b)), charging the Board of School Commissioners for the City of Indianapolis with racial discrimination in the assignment of faculty and students. The portion of the case relating to faculty assignments was tried separately—apparently under Fed. R. Civ. P. 42(b), 28 U. S. C. Pursuant to facts admittedly reflected by the school board's statistical records, the parties stipulated that the school board had considered certain racial factors in the assignment of teachers. On the basis of this stipulation the trial court entered a consent decree finding unlawful discrimination in faculty assignments and ordered remedial injunctive relief. See the related case of *Burns* v. *Board of School Commissioners*, 302 F. Supp. 309 (S. D. Ind. 1969), *aff'd*, 437 F. 2d 1143 (7th Cir. 1971). This matter is not before us.

Our concern is with the student portion of the case. While this portion of the case was pending, Citizens of Indianapolis for Quality Schools (CIQS), a corporation, moved to intervene as a party defendant on behalf of all students in the Indianapolis Public Schools who were children of its 5,000 members and on behalf of all other students in the school system. Shortly thereafter, twenty-two students seeking intervention on their own behalf and on behalf of all other students moved to be named as additional parties to the petition previously filed by CIQS. The trial court denied the motion to intervene, finding that "although the applicants . . . had a practical interest in the resolution of the litigation, they had no legal interest over and above that of the defendant Board of School Commissioners and, further, that there was no showing that this interest was not being adequately

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represented by the defendants." The trial court authorized the applicants to participate *amici curiae.*

After trial on the student portion of the case, the District Court found that the Indianapolis school system had been unconstitutionally segregated. The school board has appealed from this determination. At this point in the litigation the trial court broadened the scope of the lawsuit to include consideration of whether consolidation of the Indianapolis schools with surrounding school systems is necessary for the effectuation of a unitary school system. Apparently in consequence of this enlargement, two black students were allowed to intervene as parties plaintiff on behalf of all black students in the Indianapolis schools. These intervenors filed a complaint seeking to add several additional parties as defendants and alleging that the maintenance of separate school systems in the Indianapolis metropolitan area had resulted in a denial of their constitutional rights. Thereafter, the City of Indianapolis, the Indianapolis Housing Authority, and twelve school systems in the area surrounding Indianapolis were made additional defendants and further proceedings are now pending in the trial court.

Before intervention as a matter of right will be granted under Rule 24(a)(2), the applicant must show: (1) an interest relating to the property or transaction which is the subject of the lawsuit; (2) that disposition of the lawsuit may impair his ability to protect that interest; and, (3) that his interest is not adequately represented by the existing parties. It may be conceded for purposes of this appeal that "[a]ll students and parents, whatever their race, have an interest in a sound educational system and in the operation of that system in accordance with the law." *Moore* v. *Tangipahoa Parish School Board,* 298 F. Supp. 288, 293 (E. D. La. 1969). See also *Hatton* v.

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County Board of Education of Maury Co., Tenn., 422 F. 2d 457, 461 (6th Cir. 1970); *Smuck* v. *Hobson*, 408 F. 2d 175, 178, 180 (D. C. Cir. 1969). It may also be conceded that this asserted interest might, as a practical matter, be impaired by the disposition of this litigation.

We must, however, agree with the trial court's conclusion that this conceded interest was adequately represented by the school board in those portions of the case which have thus far been adjudicated. ". . . [R]epresentation is adequate if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor, and if the representative does not fail in the fulfillment of his duty." *Martin* v. *Kalvar Corp.*, 411 F. 2d 552, 553 (5th Cir. 1969). See also *Stadin* v. *Union Electric Co.*, 309 F. 2d 912, 919 (8th Cir. 1962), *cert. denied*, 373 U. S. 915; *Moore* v. *Tangipahoa Parish School Board*, *supra* at 291; *Peterson* v. *United States*, 41 F. R. D. 131, 133 (D. C. Minn. 1966).

There have been no allegations that the school board's interests are adverse to the appellants or that it has, at any time, acted in bad faith. Rather, as we read it, the claim is that by entering into stipulations and a consent decree in the faculty portion of this case the school board failed to assert appellants' interests as vigorously and effectively as appellants would have had they been parties to the litigation; moreover, this attitude on the part of the school board is said to indicate the possibility of continued inadequate representation. The ready and conclusive answer is that: (1) the judgment of the court in the faculty portion of the case was based on stipulated, relevant, statistical facts as to which there can be no dispute—indeed, appellants neither deny nor attack these facts in any way; and (2) the consent decree was the inescapable legal consequence of application of fundamen-

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tal law to these facts. That appellants would have been less prone to agree to the facts and would have taken a different view of the applicable law does not mean that the school board did not adequately represent their interests in the litigation. See *Bumgarner* v. *Ute Indian Tribe of Uintah and Ouray Res.*, 417 F. 2d 1305, 1308 (10th Cir. 1969); *Stadin* v. *Union Electric Co., supra.* As to the student portion of the case in which appellants now seek to intervene, it is sufficient to say that the school board has defended every step of the proceeding to the point of judgment and, furthermore, has perfected an appeal from the trial court's findings that the Indianapolis school system is unconstitutionally segregated. At this juncture of the litigation we cannot say that the trial court erroneously denied intervention under Rule 24(a).

But, inasmuch as the appellants' asserted interests involve legal and factual issues in common with the main action, the trial court may, in its discretion permit intervention under Rule 24(b), if to do so would not unduly delay or prejudice adjudication of the rights of the original parties. The discretion committed to the trial judge in this area is, to be sure, wide, and we should be careful not to pre-empt it. It remains, nevertheless, a judicial discretion subject to review for abuse. See *Brotherhood of R. R. Trainmen* v. *Baltimore & O. R. R.*, 331 U. S. 519, 524-525 (1946); *Neusse* v. *Camp*, 385 F. 2d 694, 704 (D. C. Cir. 1967); *Moore* v. *Tangipahoa Parish School Board, supra* at 292-293. After considering the facts and circumstances before the trial judge at the time the motion for intervention was entertained, we cannot say that the trial judge's decision amounted to an abuse of discretion.

However, changes in the scope of the litigation which occurred after the denial of intervention are relevant to a determination of whether permissive intervention should

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now be granted. The trial judge's decision to consider the desirability of consolidating the Indianapolis schools with surrounding school systems is an important change. Permitting intervention in support of appellants' asserted interests may prove helpful to the trial judge's consideration of all aspects of this societally affected legal problem. It is also significant, we think, that two black students have been permitted to intervene as parties plaintiff in order to represent the particular interests of all black students in the Indianapolis schools.

In these circumstances, although we have found no abuse of discretion in the trial judge's initial determination, we vacate the denial of intervention and remand the matter for reconsideration in the light of the later developments. Such intervention, of course, would be conditioned upon appellants' adoption of all previous adjudications and upon a determination that they are proper representatives of the class on whose behalf intervention is sought. See *Moore* v. *Tangipahoa Parish School Board, supra* at 293-924; Shapiro, "Some Thoughts on Intervention Before Courts, Agencies and Arbitrators," 81 Harv. L. Rev. 721, 752-756 (1968).

The government contends that CIQS, as a corporation, is not a member of the class which it seeks to represent. Whether CIQS is a proper class representative is a question which should be determined by the trial court in the first instance. It is noteworthy, however, that for purposes of standing ". . . an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club* v. *Morton*, ... U. S. ..... (April 19, 1972).[1] This is especially true when representation of the

1. See, *e.g.*, *NAACP* v. *Button*, 371 U. S. 415, 428 (1963); *NAACP* v. *Alabama*, 357 U. S. 449, 458-460 (1958); *Arkansas Education Ass'n* v. *Board of Education, Portland, Ark. Sch. Dist.*, 446 F. 2d 763, 766 (8th Cir. 1971); *National Automatic Laundry and Cleaning Council* v. *Schultz*, 443 F. 2d 689, 693-694 (D. C.

interests involved is the primary reason for the organization's existence. See *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 937 (2d Cir. 1968). The requirements for intervention, moreover, should generally be more liberal than those for standing to bring suit. Shapiro, *supra* at 726, *et seq.*

In the event CIQS is ultimately deemed to be truly representative of the students who are children of its members, the trial court should determine whether the class should also embrace the twenty-two students specifically named in the petition and all other students similarly situated. The case is remanded for further proceedings in accordance with these views.

Cir. 1971); *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F. 2d 232, 234-235 (4th Cir. 1971); *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F. 2d 1093, 1097 (D. C. Cir. 1970); *Citizens Association of Georgetown* v. *Simonson*, 403 F. 2d 173, 176 (D. C. Cir. 1968); *Smith* v. *Board of Education of Morrilton Sch. Dist. No. 32*, 365 F. 2d 770, 777 (8th Cir. 1966); *Sisters of Prov. of St. Mary of the Woods* v. *City of Evanston*, 335 F. Supp. 396, 401 (N. D. Ill. 1971); *Wisconsin Students Ass'n.* v. *Regents of Univ. of Wis.*, 318 F. Supp. 591, 593 (W. D. Wis. 1970). And *cf. Organized Mig. in Com. Act* v. *James Archer Smith Hosp.*, 325 F. Supp. 268, 270 (S. D. Fla. 1971); *National Welfare Rights Organization* v. *Wyman*, 304 F. Supp. 1346, 1348 (E. D. N. Y. 1969); *Wis. State Emp. Ass'n.* v. *Wis. Nat. Resources Bd.*, 298 F. Supp. 339 (W. D. Wis. 1969).

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Indiana
Indianapolis Division

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants.*	Civil Action No. IP 68-C-225

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The plaintiff having filed its motion herein praying for a preliminary injunction, as appears more fully in said motion, and the plaintiff and the defendants having agreed upon a basis for the adjudication of the matters to which said motion for a preliminary injunction is related and having entered into certain stipulations, the originals of which have been filed with the Court, and due consideration having been given these matters by the Court, now, the parties having agreed to the contents thereof, the Court makes its Findings of Fact, Conclusions of Law and enters its Order as follows:

Findings of Fact

1. On July 30, 1968, The Board of School Commissioners of the City of Indianapolis adopted Resolution 5851-1968 regarding the assignment and reassignment of teachers and other professional staff members of the Indianapolis school system.

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2. The parties have stipulated that for many years prior to the adoption of said Resolution 5851-1968 and at least until July 9, 1968, it had been the general policy and practice of the defendants and their predecessors in office, including The Board of School Commissioners of the City of Indianapolis, through persons acting on their behalf, to fill vacancies, to assign teachers (including substitute teachers) and staff members to schools, and to administer transfer policies, including approving and disapproving transfer applications, so that, in general, the faculty and staff of each school mirrored the racial composition of the school's student body. As a result of this general policy and practice and as reflected in Stipulations I through XII filed herein, all Negro or almost entirely Negro faculties and staffs were generally assigned to schools with all Negro or almost entirely Negro student bodies, all white or almost entirely white faculties and staffs were generally assigned to schools with all white or almost entirely white student bodies, and the remaining schools were generally assigned faculties and staffs whose racial composition mirrored the racial composition of the student bodies of those schools.

3. There has been, therefore, a disproportionately high number of Negro teachers in schools with all or almost entirely Negro student bodies and a disproportionately low number of Negro teachers in schools with all or almost entirely white student bodies.

4. The Court has considered the School Board's Resolution 5851-1968, and for the purposes of this hearing and the plaintiff's application for a preliminary injunction, has considered the School Board's plan for the 1968-1969 school year as modified and agreed to by the parties.

5. With respect to the motion of the United States for a preliminary injunction, the Court has considered only the question of faculty and staff assignments in the Indianapolis public school system for the 1968-1969 school year.

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Conclusions of Law.

1. This Court has jurisdiction of the parties and the subject matter of this action under Section 407 of the Civil Rights Act of 1964, 42 U. S. C. 2000c-6, and under 28 U. S. C. 1345.

2. The defendants' policy and practice stated in paragraph 2 of the findings of fact, which resulted in having the racial composition of the faculty and staff in each school mirror, in general, the racial composition of the school's student body, deprived students of the equal protection of the laws in violation of the Fourteenth Amendment.

3. The plaintiff, therefore, is entitled to relief.

4. The School Board's plan for 1968-1969 as set forth in Resolution 5851-1968, specifying the number of regular classroom teachers, part-time teachers and special services personnel, by race, to be assigned to each school in the Indianapolis public school system, is approved except as modified in the Court's order.

Order.

It is hereby ORDERED, ADJUDGED and DECREED:

1. The defendants, their agents, employees and successors, in accordance with the provisions of their Resolution 5851-1968, shall with respect to the school year 1968-1969, discontinue the policy and practice described in finding of fact number 2, and shall take the actions required in paragraphs 2 through 5 of this Order.

2. The School Board plan set forth in Resolution 5851-1968, specifying for the 1968-1969 school year the number of regular classroom teachers, part-time teachers and special services personnel, by race, to be assigned to each school in the Indianapolis public school system, which

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portion of said plan referring to the 1968-1969 school year is Attachment A hereto, is hereby adopted, except that said plan, by agreement of the parties, shall be modified as follows:

(a) By assigning white and Negro regular classroom teachers so that for the 1968-1969 school year the following schools shall be assigned the following numbers of regular Negro and white classroom teachers:

School	W	N
4	6	22
17	3	10
23	4	12
24	3	8
26	10	45
29	5	18
32	4	15
36	5	21
37	6	28
40	1	5
41	11	47
42	6	27
56	6	30
63	4	12
64	5	23
87	4	18

(b) By assigning an additional 64 Negro regular classroom teachers to schools shown in the School Board's plan to have none or only one Negro regular classroom teacher assigned for 1968-1969. Such assignments shall be made so that all such schools have at least one Negro regular classroom teacher for the 1968-1969 school year and that as many of such schools

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as possible have more than one Negro regular classroom teacher for said year.

3. The assignments referred to in paragraph 2 of this Order may, where possible, be achieved by new hiring and voluntary transfers of teachers. However, if those measures do not produce sufficient numbers of teachers the School Board shall assign or reassign the additional teachers needed to comply.

4. The School Board shall file with the Clerk of the Court, and deliver copies to the United States Attorney, within 30 days after the opening of schools for the 1968-1969 school year, the following reports:

(a) a report showing the number of regular classroom teachers, part-time teachers and special services personnel of each race assigned to each school in the system.

(b) a report showing for each school in the system the name, race, grade or other type of position of each regular classroom teacher, part-time teacher and special service person assigned to the particular school after the effective date of this Order. This report shall also show the date of the assignment, whether the person was newly hired for the system, voluntarily agreed to transfer from another school in the system or was reassigned by the defendants. In each of the latter two cases the report shall also show the school to which the person was initially assigned.

5. Upon reasonable notice, the defendants shall permit representatives of the Department of Justice to inspect and copy those records which show the names, race and assignments of substitute teachers assigned during the 1968-1969 school year.

It is hereby further Ordered, Adjudged and Decreed that a decision respecting all other matters raised in the

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plaintiff's complaint shall be deferred until any subsequent hearing in this matter.

Jurisdiction.

The Court hereby retains jurisdiction over this case.

ENTER

/s/ S. HUGH DILLON,
United States District Judge

This the 5th day of August, 1968.

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APPENDIX C.

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* THE BOARD OF SCHOOL COMMISSIONERS OF INDIANAPOLIS, Indiana, et al., *Defendants.*	No. IP 68-C-225

ORDER OF APRIL 29, 1971.

A pretrial conference was held in this cause in open court on April 29, 1971. The counsel present representing the plaintiff were:

Brian K. Landsberg, Chief, Education Section Civil Rights Division, Department of Justice;

Stanley B. Miller, United States Attorney for the Southern District of Indiana;

John D. Leshy, Attorney, Education Section Civil Rights Division, Department of Justice.

The counsel present representing the defendants were:

G. R. Redding, Baker & Daniels

E. C. Ulen, Jr., Baker & Daniels

Harold E. Hutson, counsel for the applicants for intervention, Laura Wallace, et al., was also present.

The Court first considered the pending application for intervention by Laura Wallace, et al. Following oral argu-

ment, the Court found that, although the applicants, students in the Indianapolis Public Schools and their parents, had a practical interest in the resolution of the litigation, they had no legal interest over and above that of the defendant Board of School Commissioners and, further, that there was no showing that this interest was not being adequately represented by the defendants. Therefore, it is ORDERED that the motion for intervention is DENIED, but that the applicants for intervention, Laura Wallace, et al., are permitted to participate as *amici curiae,* with the rights through their counsel to submit briefs and to participate in oral arguments, to be served with all subsequent pleadings in this case, and the right to inspect and make arrangements for receiving copies of proposed exhibits and stipulations prepared by the parties in the litigation, with the understanding that the parties will provide counsel for *amici curiae* with those items copies of which already exist, but that those items copies of which do not now exist will be made available for copying to counsel for *amici curiae.*

Further, the Court was advised by counsel of the current status of the case and of changes in status that have occurred since the previous pretrial conference of January 28, 1970. Further scheduling for the exchange of exhibits, witness lists, and other items, in preparation for trial, were discussed with counsel. With the concurrence of counsel for both parties, it is Ordered that:

1. The plaintiff shall, on or before May 7, 1971, serve upon the defendants a list of the names and addresses of all witnesses expected to be relied upon at trial, other than witnesses who may be called to testify should certain proposed exhibits not be stipulated to and other than witnesses intended to be used solely for the purpose of impeachment or rebuttal.

2. The defendant shall, within seven days of the receipt of plaintiff's witness list, serve upon the plaintiff a list of the names and addresses of all the witnesses the defendant intends to rely on, with the exceptions noted in paragraph 1, above.

3. Between the date of this Order and June 21, 1971, both parties should attempt to reach agreement on the admissibility of as many proposed exhibits and stipulations as possible. By June 21, 1971, each party should file (a) its proposed exhibits and stipulations with the Court; and (b) its objections to the admissibility of the other party's proposed exhibits and stipulations. If the admissibility of any of these proposed exhibits and stipulations is not agreed to, the party objecting shall file, by June 21, 1971, with copies to the opposing party and to counsel for *amici curiae*, a statement specifying the proposed exhibits and stipulations objected to and the specific objections it has to the admissibility of each. The party whose proposed exhibits or stipulations are objected to shall file, within ten days after receipt of the statement of objections, and with copies to the opposing party and to counsel for *amici curiae*, its response to the objections.

4. Trial in this cause shall commence on July 12, 1971.

Dated this 14th day of May, 1971.

/s/ S. Hugh Dillon,
Judge, United States District Court, Southern District of Indiana.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-710

CITIZENS OF INDIANAPOLIS FOR QUALITY SCHOOLS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case arises as an adjunct to the Indianapolis school desegregation litigation which was commenced by the United States in 1968 pursuant to Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6. Prior to the trial on the merits, petitioners moved in the district court for leave to intervene as defendants.[1]

[1] On February 6, 1970, Citizens of Indianapolis for Quality Schools, Inc. (CIQS) filed a petition to intervene on behalf of all children of its members and all other students in the Indianapolis public schools. On February 24, 1970, petitioners Laura Wallace, *et al.*, (twenty-two students in the Indianapolis schools) moved to be named as additional parties to the petition for intervention previously filed by the CIQS. Neither motion stated whether intervention was sought under Rule 24 (a) or (b) of the Federal Rules of Civil Procedure.

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On April 29, 1971, the district court denied intervention on the grounds that movants "had no legal interest over and above that of the defendant Board of School Commissioners and, further, that there was no showing that this interest was not being adequately represented by the defendants."[2] Participation as *amicus curiae* was authorized.

Trial on the merits commenced on July 12, 1971, and on August 18, 1971, the district court issued a decision (332 F. Supp. 655) finding that the Indianapolis schools had been unconstitutionally segregated. The defendant school district's appeal from that decision has been briefed and argued and is presently awaiting decision in the court of appeals.

Meanwhile, the district court's order denying intervention was separately appealed by petitioners. On August 14, 1972, the court of appeals entered an opinion (Pet. App. A1–A7) sustaining the denial of intervention but remanding for reconsideration of permissive intervention in light of developments occurring subsequent to the original denial.[3] On September 13, 1972, the district court granted intervention to

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[2] Pet. App. A15.

[3] In its decision of August 18, 1971, the district court suggested that certain legal questions regarding the consolidation of the Indianapolis and surrounding school systems should be resolved prior to entry of a long-range desegregation order. Several parties have been added to the case in the district court, and further proceedings are now pending on this question.

the corporate petitioner (App. A, *infra*).[4] No conditions upon intervention were stated. Petitioners have thus substantially achieved the result they wish this Court to direct.

It is unclear what judgment the petition seeks to review. If review is sought of the district court's order of April 29, 1971, denying intervention (see Pet. 1, Pet. App. A14), the short answer is that this Court has no jurisdiction directly to review that order. Indeed, petitioners so recognized, since they appealed that order to the court of appeals, which on August 14, 1972, remanded the case. To the extent that petitioners are challenging the court of appeals' decision insofar as it affirmed the denial of mandatory intervention, that ruling presents no issue warranting review by this Court. Finally, if the individual petitioners are challenging the district court's order of September 13, 1972, granting permissive intervention to the corporate petitioner but denying it to them, the proper method for challenging that order is by appeal to the court of appeals.

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[4] Although intervention was granted only to Citizens for Indianapolis for Quality Schools, Inc., the individual plaintiffs here are simply the members of that organization who petitioned individually as well as through their organization.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
DAVID L. NORMAN,
Assistant Attorney General.
BRIAN K. LANDSBERG,
WILLIAM C. GRAVES,
Attorneys.

JANUARY 1973.

APPENDIX A

In the United States District Court for the Southern District of Indiana

Indianapolis Division

(No. IP 68-C-225)

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL., DEFENDANTS

Entry for September 13, 1972

The Court takes judicial notice of the fact that certain changes have recently taken place with respect to the composition of the defendant The Board of School Commissioners of the City of Indianapolis, Indiana, and that a change has taken place in the office of Superintendent of Schools, and accordingly it is ordered that Karl R. Kalp be substituted for Stanley C. Campbell as a party defendant herein in his official capacity as Superintendent of Schools of the School City of Indianapolis, that Carl J. Meyer, Paul E. Lewis, Lester E. Neal, and Constance R. Valdez be substituted, respectively for Robert D. DeFrantz, Sammy Dotlich, Jerry P. Belknap, and Landrum E. Shields, as members of the defendant The Board of School Commissioners of the City of Indianapolis, and that Kenneth T. Martz be substituted for Robert D. DeFrantz as President of said board.

It is further considered and ordered that, in consideration of the expanded posture of this case the petition to intervene of Citizens of Indianapolis for Quality Schools, Inc., is granted, it being determined that said not-for-profit corporation is representative of the students who are children of its members, as well as of the students specifically named in its petition and all other students similarly situated. Said intervenor is aligned as a party defendant.

It is further ordered that Indianapolis Urban League, Inc., be permitted to file its brief as Amicus Curiae with respect to the issues raised by the petition of the intervening plaintiffs Barbara Gardner, et al.

And now, the parties plaintiff and defendant having announced ready for hearing with regard to the petition of the intervening plaintiffs Barbara Gardner, et al., the intervening plaintiffs offer evidence in chief, and having concluded the presentation of such evidence now rest. Whereupon the defendant The Board of School Commissioners of the City of Indianapolis and the defendant individual members of such board and the Superintendent of Schools commence the introduction of their evidence in chief, and the hour of adjournment having arrived and said defendants not having concluded, the Court adjourned at 6:00 P.M., to reconvene on September 14, 1972, at 1:15 P.M.

U.S. GOVERNMENT PRINTING OFFICE: 1973